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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term 2003

MELVIN T. YAMAMOTO, ELAINE S. YAMAMOTO, and MAXINE H. TAMPON,

Petitioners,

vs.

BANK OF NEW YORK, BNC MORTGAGE, INC., and U.S. FINANCIAL MORTGAGE CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Resolving a conflict among Circuits and within the Ninth Circuit itself, may a District Court pursuant to Section 1635 of Title 15 require borrowers to first tender the reduced principal amount of their Truth-In-Lending Act rescission claims before allowing them to proceed to trial, otherwise subjecting them to dismissal?

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I. JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon Section 1635 of Title 15 of the United States Code.

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail on October 27, 2003, within ninety days of the denial of rehearing by the court of appeals on July 29, 2003, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(3).

II. AUTHORITATIVE PROVISIONS

The Ninth Circuit Court of Appeals' published opinion being challenged, Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003), is set forth in the Appendix to this Petition, together with the relevant district court decisions; the relevant controlling provisions of the Truth-In-Lending Act ("TILA") contained in Section 1635 of Title 15 are footnoted in the text of this Petition.

III. STATEMENT OF THE CASE

Petitioners refinanced their principal residence on January 24, 1997, securing a mortgage from BNC Mortgage, Inc., in the amount of $172,500.

Petitioners obtained their loan through U.S. Financial Mortgage Corporation, a mortgage broker, and their mortgage was eventually assigned to the Bank of New York.

On July 6, 1998, Petitioners sent a notice of cancellation to BNC Mortgage, Inc., based upon several Truth-In-Lending Act ("TILA") violations, including a failure to deliver to any of them copies of any Notice Of Right To Cancel, and a failure to correctly disclose various financial credit terms of their loan.

After their rescission request was refused, Petitioners, represented by trial counsel, filed a rescission complaint in the United States District Court for the District of Hawaii on May 18, 1999.

On December 12, 2000, Petitioners moved for

summary judgment on their TILA claims, and on January 12, 2001.

The Bank of New York filed a cross-motion for summary judgment against Petitioners' TILA claims.

Both motions were heard on February 2, 2001, and on February 12, 2001, by written Order, the district court denied both motions "to the extent they apply to the rescission claims, requiring however that Petitioners first return the monies borrowed to the Defendants "within 60 days" or "the Court will dismiss the rescission claim."[1]

Over Petitioners' objection, claiming that they could not make such an immediate cash tender, upon the expiration of the 60-day period their complaint was dismissed on June 19, 2001, by the district court.

Petitioners appealed *pro se*.

On May 29, 2003, by published opinion, the court of appeals affirmed.

Petitioners obtained appellate counsel just prior to oral argument, who on July 3, 2003, assisted by co-counsel from the Association of Retired Persons Foundation Litigation, filed with the consent of the panel a timely petition for rehearing, which was subsequently denied on July 29, 2003.

Petitioners have now filed a timely petition requesting the issuance of a writ of *certiorari* from this Court on October 27, 2003, seeking further review.

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[1] An additional issue considered by the district court was the fact that the Yamamotos had "filed for Chapter 7 bankruptcy protection in March 1998 and did not list a TILA claim as an exempt asset," leading the district court to conclude that they therefore lack "standing to bring a TILA claim," allowing 60 days also for their former bankruptcy trustee to intervene as a plaintiff, while recognizing that Tampon, their daughter, nevertheless had standing to rescind. For that reason, the standing issue is however not relevant here.

IV. LEGAL ARGUMENT

1. Rescission is a statutory, substantive precondition to a borrower's obligation to tender repayment to creditors.

Congress enacted TILA in order to establish a national consumer legislative policy to curb widespread mortgage credit fraud, pursuant to the U.S. Constitution's Supremacy, Banking, and Interstate Commerce Clauses.

"The avowed purpose of the Consumer Credit Protection Act, enacted in 1968 after eight years of Congressional consideration was . . . to remedy unscrupulous and predatory creditor practices throughout the nation," N.C. Freed Co., Inc. v. Board of Governors of the Federal Reserve System, 473 F.2d 1210, 1214 (2nd Cir. 1973), *cert. denied*, 414 U.S. 827 (1973).

TILA was enacted by Congress in 1968 as Section 1601, *et seq.*, of Title 15 of the United States Code and implemented by Section 226 of Title 12 of the Code of Federal Regulations, known as Regulation Z, to protect consumers from material nondisclosures varying in amount by more than $35, and from failures to provide proper right-to-cancel notices, allowing borrowers to rescind loan transactions and void mortgage security interests otherwise attaching to a consumer's principal residence.[2]

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[2] Section 1635: (a) Disclosure of obligor's right to rescind. Except as otherwise provided in this section, in the case of any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later . . .

Federal law is well settled.

If for instance, two required "Notice Of Right To Cancel" forms are not delivered to the consumer, the consumer has the full three-year statutory period in which to rescind the loan transaction; see, *e.g.*: Williamson v. Lafferty, 698 F.2d 767, 768 (5th Cir. 1983); Semar v. Platte Valley Federal Savings and Loan Association, 791 F.2d 699, 701-702 (9th Cir. 1986); Reynolds v. D&N Bank, 792 F. Supp. 1035, 1038 (E.D. Mich. 1992); New Maine National Bank v. Gendron, 780 F. Supp. 52, 57 (D. Maine 1991); Apaydin v. Citibank Federal Savings Bank (In re Apaydin), 201 B.R. 716 (Bk. E.D. Pa. 1996); Mayfield v. Vanguard Savings & Loan Association, 710 F. Supp. 143, 146 (E.D. Pa. 1989); and Jenkins v. Landmark Mortgage Corporation of Virginia, 696 F. Supp. 1089, (W.D. Va. 1988).

That issue is everywhere regarded as one for trial, notwithstanding whatever written disclaimer a borrower may have been induced to sign at loan closing; see, *e.g.*, Powers v. Sims & Levin Realtors, 396 F. Supp. 12, 22-23 (E.D. Va. 1975), *affirmed in part, and reversed in part on other grounds*, 542 F.2d 1216 (4th Cir. 1976); Kicken v. Valentine Production Credit Association, 628 F. Supp. 1008 (D.C. Neb. 1984), *affirmed*, 754 F.2d 378 (8th Cir. 1984); Hawaii

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(b) Return of money or property following rescission. When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor . . . becomes void upon a rescission. . . . Upon the performance of the creditor's obligations under this section ["termination of any security interest"] the obligor shall tender the property to the creditor [or] . . . its reasonable value . . . .

(f) Time limit for exercise of right. An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first . . . .

Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1 (2000); Cintron v. Bankers Trust Co., 682 So. 2d 616 (Fla. App. 1996); Williams v. Gelt Financial Corp., 237 B.R. 590, 595 (E.D. Pa. 1999).

TILA allows borrowers to achieve rescission by sending their creditor a rescission letter; Regulation Z, §226.23(a)(2).

This is a self-enforcing mechanism which does not require participation by courts; see, *e.g.*, Riggs v. Government Employees Financial Corp., 623 F.2d 68 (9th Cir. 1980); Mills v. Home Equity Group, 871 F. Supp. 1482 (D.D.C. 1994); In re Williams, 291 B.R. 636 (Bankr. E.D. Pa. 2003); Ralph J. Rohner & Fred H. Miller, *The Law of Truth in Lending*, 8.04[1][c](2000); Ralph C. Clontz Jr., *Truth-in-Lending Manual*, 6.03[4] at 6-50 (2003).

A borrower's notice of rescission has two legal effects: (1) it voids the mortgagee's security interest; see; *e.g.*, Semar v. Platte Valley Fed. Savings & Loan Association, 791 F.2d 699, 705 (9th Cir. 1986) ("on rescission, the security interest is dissolved"), and (2) it terminates the borrower's obligation to pay finance or other charges, *id.* ("the borrower 'is not liable for any finance or other charge'"); 15 U.S.C. §1635(b); Reg. Z, §226.23(d); Clontz, *supra*, 6.03[4] at 6-49 to 6-50.

These are *substantive* requirements which the Act imposes, reversing the common law order of rescission; see, *e.g.*, Semar, 791 F.2d at 706; Palmer v. Wilson, 502 F.2d 860, 861 (9th Cir. 1974) ("although tender. . . is an equitable prerequisite to rescission, the requirement was abolished by the Truth in Lending Act."); Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1140 (11th Cir. 1992).

It is only in a disputed case when entitlement to rescission becomes a question for the court to decide.

If a court determines there was a valid right to rescind, the *substantive* requirements of TILA are effected automatically, restoring "the *status quo ante*," Quenzer v. Advanta Mortgage Corp. USA, 288 B.R. 884, 888 (D. Kan.

2003).

The Federal Reserve Board's ("Board") implementing Regulation Z, 12 C.F.R. §226.23(d), explains that these *substantive* rights immediately vest at this point.

It authorizes courts to reorder only the *procedural* aspects of rescission, and to exercise equitable discretion to effectuate rescissions in a manner which protects all parties.

Thus, TILA rescission accomplishes a statutory reordering of the common law process of rescission.

First, the borrower sends a rescission notice, which effectively voids the security interest and cancels all finance charges.

Second, the creditor tenders back and releases the security interest.

Third, the borrower tenders to the creditor.

TILA rescission is an extraordinary Congressional remedy, recognizing the inferior bargaining position of borrowers in the marketplace, shifting the burden of non-compliance onto lenders, intentionally strengthening the hand of borrowers; see, *e.g.*, Semar, 791 F.2d at 705; Williams, 968 F.2d at 1140.

Petitioners' panel, however, held that when a borrower asserts rescission rights, he or she may not be entitled to a decision on the merits of his or her TILA claim, concluding that courts are permitted to require pretrial tenders of principal: "there is no reason why a court that may alter the sequence of procedures *after* deciding that rescission is warranted, may not do so *before* deciding that rescission is warranted, 329 F.3d at 1173 (emphasis is in the original).

That view is not only contrary to the plain language of the statute. It is contrary to the decisions of all other Circuits. It is contrary to all other Ninth Circuit decisions which have considered the issue. It is contrary to the Board's interpretation of Section 1635. And, it is contrary to the practical refinancing marketplace needs of borrowers today.

2. The Ninth Circuit panel's requirement of tender as a precondition for trial in Yamamoto is contrary to the published decisions of all other Circuits.

Prior to Yamamoto, no federal court in any other circuit has required borrowers to tender first before adjudicating the validity of rescission claims.

Every other case has been either explicitly or implicitly decided to the contrary by all federal courts.

See, *e.g.*, Semar, 791 F.2d at 699; LaGrone, 534 F.2d 1360; Ljepava, 511 F.2d at 935; Palmer, 502 F.2d at 860; New Maine Nat'l Bank v. Gendron, 780 F. Supp. 52, 57 (D. Me. 1991); Mayfield v. Vanguard Savings & Loans, 710 F. Supp. 143 (E.D. Pa. 1989); Powers v. Sims, 542 F.2d 1216 (4th Cir. 1976); Taylor v. Domestic Remodeling, Inc., 97 F.3d 96 (5th Cir. 1996); Rudisell v. Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980); Velazquez v. Home American Credit, Inc., 254 F. Supp. 2d 1043 (N.D. Ill. 2003); F.D.I.C. v. Hughes, 684 F. Supp. 616 (D. Minn. 1988), *affirmed*, 938 F.2d 889 (8th Cir. 1991); Quenzer v. Advanta Mortgage Corp. USA, 288 B.R. 884 (D. Kan. 2003); Williams, 968 F.2d at 1142 (11th Cir.); Brown v. National Permanent Savings & Loan, 683 F. 2d. 444 (D.C. Cir. 1982).

In Rudisell v. Fifth Third Bank, for instance, the Sixth Circuit Court of Appeals concluded "[s]ince Congress clearly intended to give a right to rescind to persons in appellants' situation, this Court feels it must grant them that right," 622 F.2d 243, 254.

Only then did the Sixth Circuit condition rescission upon plaintiff's tender of the reasonable valuable of the aluminum siding.

Similarly, in F.D.I.C. v. Hughes, the Eight Circuit affirming, the court first determined that the rescission claim was valid, and then and only then directed the tender of net principal within one year, followed by a release of the security interest, 684 F. Supp. 616, 625-626.

Federal law clearly mandates that both lenders and

borrowers should be treated equally and both given their day in court.

Earlier decisions, for instance, requiring creditors to rescind first, foregoing a decision on the merits, or forfeiting the principal if the court determined the consumer's claim later to be valid, have been universally discredited; see, *e.g.*, Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974).

Lenders that dispute rescissions are today not at the mercy of borrowers' unilateral actions. They can avoid risking violating their obligation to perform first by filing declaratory judgment actions within 20 days following notice of the rescission; see Aquino v. Public Finance Discount Corp., 606 F.2d 504, 508 (E.D. Pa. 1985).

When borrowers, who are the intended beneficiaries of TILA, similarly seek court intervention, it is surely inequitable and uneven treatment to require them "to sacrifice [their] day in Court" because of an inability to make an immediate pretrial tender; Rohner, *supra* at 652.

TILA clearly contemplates that the lender, if anyone, must perform first; *id.*; Williams, 968 F.2d at 1140.

By contrast, Yamamoto turns TILA's mutual obligations into a one-sided, pretrial bond imposed only on the very party who is "inherently at a disadvantage in loan and credit transactions," bestowing a windfall on the more powerful creditor; Semar, 791 F.2d at 705; Jackson v. Grant, 890 F. 2d 118, 122 (9th Cir. 1989).

While federal courts have increasingly exercised their equitable powers to reorder TILA's rescission remedy *procedurally* to protect both parties, it has always been equally clear in doing so that federal courts must be careful not to "frustrat[e] the main purpose of the Act, which is to allow rescission," Ljepava, 511 F.2d at 944.

At its core, it is -- if nothing else -- a matter of being faithful to the express language of Section 1635, there being no justification for disregarding a statute's plain meaning, Beach v. Ocwen Federal Bank, 523 U.S. 410, 417 (1998).

3. The Ninth Circuit panel's requirement of tender as a precondition for trial in Yamamoto is contrary to other published decisions in its own Circuit.

The panel's opinion conflicts with long-established precedent in the Ninth Circuit, amounting to an unprecedented, one-sided, pretrial bond requirement whose due process implications were not even considered by the Yamamoto panel; see, *e.g.*, Semar v. Platt Valley Federal Savings & Loan Association, 791 F.2d 699 (9th Cir. 1986); LaGrone v. Johnson, 534 F.2d 1360 (9th Cir. 1976); Ljepava v. M.L.S.C. Properties, Inc., 511 F.2d 935 (9th Cir. 1975); and Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974).

In Semar, for instance, the Ninth Circuit held that a TILA rescission effects a cancellation of finance and other charges and is a substantive right that courts are not free to ignore, and that district courts are obligated to exercise equitable discretion to structure rescission in a manner that is fair to both parties only after an adjudication on the merits occurs at trial.

Semar, virtually ignored by the Yamamoto panel, held that district courts do not have equitable discretion to revise the *substantive* provisions of the statute; Semar, 791 F.2d at 705-706 n.15.

In Semar, the creditor argued that the court had equitable discretion to deny a borrower's right to rescission as defined by TILA; *id.* at 705-706. The Semar panel, to the contrary, held that a borrower's rescission automatically cancels any obligation to pay finance or other charges and that this is a *substantive* requirement of TILA that courts are not free to amend ("we defer to Congress' method of enforcing TILA and follow the plain language of the statutes," *id.* at 706).

Semar, Palmer and their progeny, while permitting district courts to condition the termination of a lender's

security interest on tender by borrowers of the net principal owing after deduction of finance and other charges, have held that the cancellation of finance and other charges cannot be *substantively* altered by courts; see, *e.g.*, Riopta v. Amresco Residential Mortgage Corp., 101 F. Supp. 2d 1326, 1336 (D. Haw. 1999) ("because the Court has found rescission appropriate . . . Plaintiffs are entitled to recover all finance and interest charges associated with the mortgage.").

The Yamamoto panel's refusal to eliminate interest and other charges from the tender amount under TILA is not merely a reordering of the procedures, but a denial of TILA's substantive right to rescind because "courts [do not have] . . . equitable discretion to alter TILA's substantive provisions," Semar, 791 F.2d at 706 n.15.

Thus, as another Ninth Circuit panel made clear in Dinsmore-Thomas v. FDIC, 1998 U.S. App. LEXIS 2777 (9th Cir. 1998), where rescission is conditioned on tender, and the consumer is unable to make a tender, the consumer is still entitled to cancellation of finance and other charges on the loan ("in addition, after Dinsmore-Thomas failed to satisfy the repayment condition, the district court properly reinstated the promissory note for the reduced sum of $96,739.63 rather than the full amount of $180,750.00," id. at 3. *Accord,* In re Wepsic, 231 B.R. 768 at 777.

In contrast, Yamamoto effectively canceled the rights of Petitioners who were unable to make an unrealistic, immediate cash tender without first having the validity of their rescission claim adjudicated in their favor.

By thus allowing district courts to avoid addressing the merits of borrowers' rescission claims, Yamamoto will deprive borrowers, legally entitled to rescission benefits, including cancellation of finance and other charges, from any practical ability to enforce that cancellation by at least knowing how much their tender is supposed to be.

4. The Ninth Circuit panel's requirement of tender as a precondition for trial in Yamamoto is contrary to the Board's administrative interpretation and Regulation Z, as a practical matter unfairly disadvantaging borrowers.

As this Court has held in Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-566 (1980), "deference is especially appropriate in the process of interpreting the Truth In Lending Act and Regulation Z," emphasizing the importance of recognizing administrative expertise "unless demonstrably irrational," according considerable respect to an agency's interpretation of its own regulations, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945); Anderson v. Brothers Ford v. Valencia, 452 U.S. 205, 219 (1981).

Regulation Z clearly sets forth a well-established and heretofore strictly adhered to procedural plan whereby a creditor must act first to cancel the security interest before the borrower is required to tender; Regulation Z, Official Commentary, Section 226.23 (d)(2) and (3) (subject to procedural modification only on equitable grounds once a rescission has been declared, *id.* at 226.23(d)(4)).

Failure to follow that procedural plan by the Yamamoto panel put Petitioners in an unrealistic borrowing posture, clearly contrary to the express intentions of Congress in enacting such consumer protection laws.

The Yamamoto panel, for instance, failed to recognize that a determination of the proper and exact tender amount can often only be achieved by evaluating the rescission claim itself through adjudication.

Rescission frequently involves a claim that the creditor understated the "finance charge," for instance, requiring a court to determine whether particular charges paid at closing were properly components of the "finance charge" under TILA; 15 U.S.C. §1635(b).

If these charges were improperly excluded from the

disclosure of the "finance charge," these and any other finance and transaction charges are subtracted from the principal of the loan to calculate the borrower's tender; 15 U.S.C. § 1635(b); Reg. Z, 12 C.F.R. § 226.23 (d)(2).

Contrary to the conclusion reached by the Yamamoto panel, 329 F.3d at 1170-1171 n.3, the tender amount for Petitioners was never determined by the district court in its Order or Judgment (see Appendix), nor was there ever any agreement among the parties as to the correct tender amount.

In Riopta, *supra*, for instance, where, if the borrower had not been entitled to rescission on other grounds, the court would have adjudicated the merits of the borrower's finance charge claim in order to determine the proper tender amount owed, 101 F. Supp. 2d at 1326.

Moreover, a trial on the merits often reveals undisclosed finance charges buried in the transaction, such as an inflated payoff of a prior mortgage to the same creditor.

Realistically, it is only after full consideration of the merits that courts are in a position to calculate the proper tender amount by deducting all finance and other charges paid by borrowers at settlement and during the life of any loan, 15 U.S. C. § 1635(b); *see* Steele v. Ford Motor Credit Co., 783 F.2d at 1016, 1019-20 (11th Cir. 1987); Lopez v. Delta Funding, 1998 U.S. Dist. Lexis 23318 *30 (E.D.N.Y. 1998) (facts there established that a $7,540 broker fee was improperly excluded from the finance charge).

Once there has been an adjudication on the merits, only then as a practical matter can district courts consider "all the circumstances" in exercising equitable powers under TILA, Palmer, *supra*, 502 F.2d at 860.

In reality, district courts rarely have sufficient information to make an informed judgment about where the equities lie until after the TILA issues are fully adjudicated.

The pretrial dismissal of TILA rescission claims

before an evaluation of their merits prevents federal courts from weighing the equities as a precondition to calculating the actual tender amount.

In addition, when TILA is only one of several claims raised by borrowers, proof of other claims (*e.g.* fraud, unconscionability, bad faith, and unfair business practices) will often buttress proof of the TILA violations and heighten the court's understanding of the equities of the parties so as to arrive at a fair tender amount.

Consider, for instance, the result in Ray v. CitiFinancial, Inc., 228 F. Supp. 2d 664, 670 (D. Md. 2002), where trial testimony persuaded the district court that $3,575.95 in insurance premiums charged in connection with the mortgage was "unwanted and unneeded" and should be used to reduce the borrower's tender obligation.

The Ray court thus considered the benefits the lender had received from the loan which might justify reducing its lien still further. It was precisely because the Ray court did not preemptively dismiss the TILA claim that it was free to exercise its "discretionary authority to reduce . . . the creditor's security interest to the extent that equitable considerations so dictate," *id.* at 670-671. In fact, as a result, Ray's tender amount was substantially reduced, thus making tender for Ray all the more feasible.

Moreover, a borrower whose claims are not preemptively dismissed may find that damages awarded on other claims are sufficient to fulfill TILA tender obligations.

The Yamamoto panel's approach is both unfair and unworkable.

Courts play a crucial role in TILA rescissions.

Where there is a dispute, the court's role is twofold. First, it decides the merits of the claim. Second, it exercises discretion to effectuate rescission in a manner equitable to

both parties.

The Yamamoto panel's approach effectively and tragically abandons both duties.

The Yamamoto panel justified its unprecedented approach by stating that it was concerned that TILA's self-effectuating scheme might unfairly force lenders to accept even meritless rescissions, Yamamoto, 329 F.3d at 1172.

That is not true. Neither borrowers nor creditors in our courts should be or are held hostage to the unilateral actions of the other; *see* Rohner at 652.

Just as a borrower should not be allowed to win a baseless rescission claim, so too a creditor should not be permitted to deprive a borrower of the rights that flow from a valid rescission by insisting on an immediate cash pretrial tender as a condition for an adjudication.

If a rescission is contested, the court plays a vital role in adjudicating the validity of such statutory consumer claims. "The natural reading of this language is that the security interest becomes void . . . because the appropriate decision maker has so determined." Large v. Conseco Finance, 292 F.3d 49, 54-55 (1st Cir. 2002).

There was no such required statutory decision making in Yamamoto. Once – and only *after* -- the claim has been adjudicated can a court exercise its equitable powers to effectuate a rescission in a manner that is both "equitable and just to the parties in view of all the surrounding circumstances," Williams, *supra*, 968 F.2d at 1142.

Other Ninth Circuit panels have recognized this responsibility and worked to fully explore tender options with the parties. TILA gives "courts the authority to restructure these loans. This could range from ordering the immediate return of the full principal amount to leaving the creditor to whatever other legal procedures might be

available under state law, " *id.* at 1142, n.9.

In Palmer, for instance, that Ninth Circuit panel suggested a creditor may even be required to "submit a proposed plan for repayment that is consistent both with [its] desire to recover the . . . principal. . . and with the Palmers' current financial situation," Palmer, 502 F.2d at 862-863.

It is only at that stage -- after a consideration of the merits of all TILA and other claims -- that courts are in the best position to sort out the "legal duties" owed both the borrower and the lender, and to effectuate an equitable rescission remedy, Ray, *supra*, 228 F. Supp. at 668.

If borrowers are unable to tender immediately, they can always be equitably allowed time to refinance or to sell their property, repaying the lender the net principal after the proper reductions are made for finance and other charges and after any statutory damages are assessed, Ljepava, 511 F.2d at 945; Powers, 542 F.2d. at 1222.

There are many other practical considerations that place borrowers at a disadvantage if required to tender in cash before being granted a rescission.

Borrowers, whose credit is impaired as a result of the foreclosure proceedings themselves, frequently will need to secure a formal rescission before being able to "tender," requiring, for instance, more time in which to refinance and the cooperation of their lender, who otherwise is not required to assist borrowers in, for instance, clearing their credit, in contrast to equitable, court-ordered rehabilitative procedures often invoked upon settlement or after trial.[3]

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[3] The panel unfairly concluded, 329 F.3d at 1173, that Petitioners lacked the ability to ever pay back any rescission amount, when the deposition testimony below only stated that Petitioners could not immediately tender in cash. *Deposition of Melvin Yamamoto*, January 11, 2001, p. 34.

V. CONCLUSION

For all of the above reasons, Petitioners pray that the decision below will be reviewed and reversed by this Honorable Court.

Petitioners seek to have their statutory -- if not due process -- rights, and those of all borrowers similarly situated, protected by this Honorable Court as Congress has so provided.

Petitioners further seek to have this Court reaffirm the important duties of district courts to fashion equitable rescission remedies fair to all parties once and only after there has been an adjudication on the merits of such important consumer claims.

Respectfully submitted,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel for Petitioners[4]

Honolulu, Hawaii
October 27, 2003

[4] The assistance of attorneys Jean Constantine-Davis and Nina Simon of the AARP Foundation Litigation in Washington, D.C., in the preparation of the text of this Petition is gratefully acknowledged.

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1
Order Granting In Part And Denying In Part Cross-Motions For Summary Judgment, Civil No. 99-00360 SPK, U.S. District Court For The District of Hawaii, Filed February 12, 2001

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MELVIN T. YAMAMOTO, ET AL.,	)	CV. NO. 99-00360 SPK
Plaintiffs,	)	ORDER GRANTING
	)	IN PART AND DENYING
vs.	)	IN PART CROSS-
	)	MOTIONS FOR SUMMARY
BANK OF NEW YORK, ET AL.,	)	JUDGMENT
Defendants.	)	

Plaintiffs Melvin T. Yamamoto, Elaine S. Yamamoto, and Maxine H. Tampon Yamamoto move for summary judgment in this Truth in Lending Act, 15 U.S.C. § 1600 et seq., ("TILA") action. In response, Defendant Bank of New York has cross-moved for summary judgment.[1]

[1] Plaintiffs object that Bank of New York has improperly used LR 7.9 (allowing related and counter-motions to be filed concurrently with an opposition) to avoid the substantive motions cut-off date, which was December 23, 2000. See Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 161 F.R.D. 426, 428-29 (D. Haw. 1995) (stating that LR 220-9 -- LR 7.9's predecessor -- "in no way automatically extends the scheduling order entered by the magistrate judge") . While this is true, in this case the Court will allow Bank of New York's counter-motion because it

Third- and Fourth-Party Defendants BNC Mortgage and U.S. Financial Corp. -- although not defendants as against Plaintiffs (Plaintiffs did not assert claims directly against them after they were impleaded) -- have opposed Plaintiffs' motion because an adverse ruling against Bank of New York could adversely impact the Third- and Fourth-Party claims. For the reasons set forth to follow, the motions are GRANTED in part and DENIED part.

I.

Plaintiffs' claims for damages are barred by TILA's one-year statute of limitations. See 15 U.S.C. § 1640(e) (providing that TILA actions must be brought "within one year from the date of the occurrence of the violation"); King v. California, 784 F.2d 910, 913 (9th Cir. 1986) (holding that the statutory period runs from the date of consummation of the transaction which is the date the money is loaned to the debtor). The subject mortgage was signed on January 24, 1997, but the instant complaint was not filed until May 18, 1999. The claims for damages under TILA are barred.

Moreover, even if the TILA damages claims were not time-barred, they would fail on the merits as against Bank of New York. Bank of New York was not the lender; it is an assignee of the mortgage loan. As such, it was not required to make disclosures to the debtors and cannot be statutorily liable for damages for any alleged failure to disclose which was not apparent on the face of the disclosure statement. See 15 U.S.C. § 1640(a) (". . . . With respect to any failure to make disclosures required under this part or part D or E of

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asserts identical arguments that Bank of New York made in opposition to Plaintiffs' Motion. Here, unlike in Molokai Chamber of Commerce, the Bank of New York is not attempting to circumvent an earlier court order specifically disallowing the filing of the motion.

this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 [regarding exceptions for violations that are "apparent on the face of the disclosure statement"]) .

II.

Plaintiffs' claim against the Bank of New York under Hawaii's unfair and deceptive trade practices act, Haw. Rev. Stat. chapter 480, also fails. Again, it is undisputed that the Bank of New York was not the originator of the loan, and is only an assignee of the mortgage loan. A TILA violation is not a per se violation of Haw. Rev. Stat. § 480-2. See Riopta v. Amresco Residential Mortgage Corporation, 101 F. Supp. 2d 1326, 1334 (D. Haw. 1999) (Kay, J.) . Even if a TILA damages claim is possible against an assignee, there is no authority that such a violation would create statutory liability under a state unfair or deceptive trade practices act statute against an assignee, who committed no wrongdoing.

III.

This leaves Plaintiffs' claim for rescission. (A rescission claim is allowed against assignees, such as Bank of New York, under 15 U.S.C. § 1641(a).) In this regard there is a question of fact over whether Plaintiffs received the proper disclosures. Plaintiffs' declarations claim that they did not receive disclosures, including a Notice of Right to [sic] Cancel, when they signed documents in their home and that they only signed documents on January 23, 1997. Yet Defendants have produced (1) a declaration of Michelle Cuatto of U.S. Financial Mortgage Corp. indicating that all Plaintiffs appeared in the U.S. Financial offices in Kapaa on January 24, 1997, and executed loan documents, and (2) a Notice of Right to Cancel, signed by Plaintiffs and dated January 24, 1997. This dispute of fact prevents summary judgment in favor of either party. (A separate material "nondisclosure" regarding the amount of the appraisal fee is discussed later.)

Defendant Bank of New York points out that Plaintiffs Melvin and Elaine Yamamoto filed for Chapter 7 Bankruptcy protection in March of 1998 and did not list a TILA claim as an exempt asset.[2] The Bank of New York contends that the Plaintiffs therefore do not have standing to bring this TILA action because the correct Plaintiff would be the Bankruptcy trustee. Indeed, in Rowland v. Novus Financial Corporation, 949 F. Supp. 1447, 1453 (D. Haw. 1996) , Judge Kay held that a TILA cause of action belongs to the bankruptcy estate. As such, unless a TILA claim is abandoned or exempt, such claims must be asserted by the trustee rather than the debtor. That is, the debtor lacks standing to bring a TILA claim. See id. at 1454 ("In absence of [a showing of exemption or abandonment], the bankruptcy trustee is the proper plaintiff for this suit")

Plaintiffs respond in two main ways. First, they contend that even if the bankruptcy trustee is the proper plaintiff, the proper remedy is not to dismiss the case, but to allow Plaintiffs the opportunity to substitute the trustee as a plaintiff. See Fed. R. Civ. P. 21 ("misjoinder of parties is not a ground for dismissal"). In fact, this is what Judge Kay allowed in Rowland, where he gave the plaintiffs 30 days to substitute the trustee in bankruptcy or to show cause why it was not necessary to do so. See 949 F. Supp. at 1461.

Second, Plaintiffs contend that even though Melvin and Elaine Yamamoto filed for bankruptcy protection, the other Plaintiff -- Maxine H. Tampon Yamamoto -- did not. (Maxine is Melvin and Elaine's daughter.) Because Maxine

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[2] Elaine Yamamoto apparently recently filed a Chapter 13 petition. The automatic stay, however, does not bar this action. See In re White, 186 B.R. 700, 704 (Bankr. 9th Cir. 1995) (stay is not applicable to offensive actions by debtor in possession or bankruptcy trustees) . There are no counter-claims asserted by Bank of New York against Elaine.

was a party to the subject transaction and is a debtor, she can properly assert a right of rescission, independent of the other Plaintiffs. TILA'S Regulation Z provides in pertinent part:

> § 226..23(a) Consumer's right to rescind. (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transaction described in paragraph (f) of the section.

12 C.F.R. § 226.23(a) (1) . Later, the same section confirms that:

> When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

12 C.F.R. § 226.23(a) (4).

Maxine asserts that, regardless of any factual dispute regarding receipt of the Notice of Right to [sic] Cancel, it is undisputed that the disclosure regarding an appraisal fee was wrong. Apparently, the disclosures regarding the appraisal fee were wrong because of an overcharge. See Dennis Nakahara and James Lull depositions, attached to Plaintiffs' Motion. This, Plaintiffs assert, gives at least Maxine a right to rescission under TILA.

All Defendants point out, however, that TILA's right of rescission is conditioned upon the debtor returning the money. This is what Judge Kay held in Rowland. See 949 F. Supp. at 1459. At their depositions, each Plaintiff indicated they could not return the amount financed. Thus, Defendants argue that rescission is impossible.

Defendant Bank of New York also argues that the

transaction is exempt from TILA as a "residential mortgage transaction" under 15 U.S.C. § 1635(e), which exempts among other things "transactions in which a mortgage . . . is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." It contends that Maxine only "acquired" her interest in the property in the subject transaction and thus the transaction is exempt (the "initial construction" prong clearly does not apply) . Presumably, Maxine was not a debtor on the original mortgage, but acquired her present 25% interest in the property only in the subject refinancing transaction. Nevertheless, this argument would only have merit if Maxine's interest were solely at issue. The transaction clearly was for consumer purposes, and Melvin and Elaine's (or the trustee's) interest is also at issue. In any event this would be a question of fact because Maxine's declaration indicates the purpose of the loan was to lower mortgage payments and was primarily for personal and family use (or allow her parents to obtain refinancing), not for her to gain title.

Plaintiffs also respond by contending that they should be given time to tender back the loan proceeds (less the finance charges set forth in 15 U.S.C. § 1635(b)). Plaintiffs point to a recent order of Chief Judge Ezra in McLaren v. Norwest, Civ. No. 99-00356DAE, wherein Judge Ezra gave the plaintiffs 120 days to tender the loan proceeds back to the lender.

Here, however, it is disputed whether Plaintiffs can fulfill the necessary tender. Plaintiffs have indicated they cannot, although they ask for time to fulfill the condition. Given this dispute, as Judge Kay reasoned in Rowland, "at this time the Court cannot categorically dismiss or grant summary judgment on all Plaintiff's claims for rescission." 949 F. Supp. at 1460. This is even more so since the Plaintiffs also ask for time to substitute the Bankruptcy Trustee as the appropriate Plaintiff. Thus, even assuming that the disclosure regarding the appraisal fee entitles Plaintiffs to rescission, the Court DENIES both Plaintiffs' and the Bank of New York's motions regarding the rescission claim.

Plaintiffs, however, are given 60 days to substitute the Bankruptcy Trustee as a proper plaintiff in this action. If they are successful in doing so, then the Plaintiffs can proceed to attempt to tender the necessary proceeds. If they do not, and if within that 60-day period Maxine Tampon Yamamoto cannot individually tender the loan proceeds, then the Court will dismiss the rescission claim.

IV.

In sum, the damages claims are DISMISSED. To that extent, Plaintiffs' Motion for Summary Judgment is DENIED and Bank of New York's Cross-Motion for Summary Judgment is GRANTED. However, both Motions are DENIED to the extent they apply to the rescission claims.

If Plaintiffs are unable to comply with the conditions stated above within 60 days of the entry of this Order, then the Court will DISMISS the remaining claims and enter judgment in this action.

DATED: Honolulu, Hawaii; February 9, 2001.

SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

2
Order Dismissing Action,
Civil No. 99-00360 SPK,
U.S. District Court For The District of Hawaii,
Filed June 15, 2001

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MELVIN T. YAMAMOTO, ET AL.,	)	CV. NO. 99-00360 SPK
Plaintiffs,	)	ORDER DISMISSING ACTION
vs.	)	
BANK OF NEW YORK, ET AL.,	)	
Defendants.	)	

By order dated February 12, 2001, the Court gave Plaintiffs 60 days to substitute the bankruptcy Trustee as a proper party or to tender the relevant loan proceeds, The Court ruled that if Plaintiffs were unable to comply with those conditions, then the Court would dismiss the remaining claims and enter judgment,. The record now reflects that Plaintiffs have failed to comply with the conditions in the Court's February 12, 2001 Order. See Plaintiffs' Status Conference Statement of June 14, 2001. Accordingly, the action is DISMISSED and the Clerk shall enter judgment in favor of Defendants and against Plaintiffs. The status conference currently set for next Wednesday, June 20, 2001 is VACATED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii; June 15, 2001.

SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

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Judgment In A Civil Action,
Civil No. 99-00360 SPK,
U.S. District Court For The District of Hawaii,
Filed June 19, 2001

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MELVIN T. YAMAMOTO, ET AL.,	)	CV. NO. 99-00360 SPK
Plaintiffs,	)	JUDGMENT IN A CIVIL CASE
vs.	)	
BANK OF NEW YORK, ET AL.,	)	
Defendants.	)	

[√] Decision by Court. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the "Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment" filed On February 12, 2001, Plaintiffs Melvin T. Yamamoto, Elaine S. Yamamoto, and Maxine H. Tampon Yamamoto's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Defendant Bank of New York's Cross-Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that pursuant to the "Order Dismissing Action" filed on June 15, 2001, the Action is DISMISSED and Judgment is entered in favor of Defendant

Bank of New York and against Plaintiffs Melvin T. Yamamoto, Elaine S. Yamamoto, and Maxine H. Tampon Yamamoto.

June 19, 2001

WALTER A.Y.H. CHINN
CLERK

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Opinion,
Case No. 01-16427,
U.S. Court Of Appeals
For The Ninth Circuit,
Filed May 29, 2003

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN T. YAMAMOTO, ET AL.,	Case No. 01-16427
Plaintiffs-Appellants,	OPINION
vs.	
BANK OF NEW YORK, ET AL.,	
Defendants-Appellees.	

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, Senior District Judge, Presiding
Argued and Submitted
May 9, 2003 – Honolulu, Hawaii
Filed May 29, 2003
Before: Alfred T. Goodwin, Pamela Ann Rymer, and Thomas G. Nelson, Circuit Judges.

OPINION

RYMER, Circuit Judge:

This appeal requires us to decide whether a court may order borrowers who seek recission of a mortgage under the Truth in Lending Act (TILA), 15 U.S.C. § 1635, to show that proceeds can be tendered if they prevail. Here, the borrowers testified that they could not fulfill TILA's tender requirement, and the district court gave them sixty days before dismissing their recission claim to attempt to do so. When they were unable to provide evidence that they could tender the proceeds, the court granted summary judgment in favor of the lender. We hold that a district court has discretion to modify the sequence of rescission events in these circumstances, and affirm.

I

On January 23, 1997, Melvin and Elaine Yamamoto, through their mortgage broker U.S. Financial Mortgage Corp. (USF), borrowed $172,500 from BNC Mortgage, Inc. (BNC) to refinance an existing mortgage on their home. The loan was co-signed by their daughter, Maxine Tampon. On February 3, 1997, BNC assigned the Yamamoto/Tampon mortgage to the Bank of New York (BNY).

After making eight payments (totaling approximately $12,000), the Yamamotos and Tampon defaulted. In March 1998, the Yamamotos filed for Chapter 7 bankruptcy relief. BNY subsequently obtained a stipulation for relief from the bankruptcy stay and instituted foreclosure proceedings on the Yamamotos' home, the property secured by the loan. The Yamamotos received a discharge in bankruptcy June 15, 1998.

In July 1998 the Yamamotos and Tampon notified BNC that they were exercising their right to cancel the loan due to

BNC's failure to provide them with notice of right to cancel forms required under TILA. They claimed that upon receipt of the letter the mortgage was automatically void and BNC was required to release its security interest in their home within 20 days. BNC responded that a timely Notice of Right to Cancel had been provided on January 24, 1997. The Yamamotos/Tampon mailed a similar letter to BNY on September 30, 1998. BNY then discontinued the foreclosure proceedings.

The Yamamotos and Tampon brought suit against BNY, seeking statutory damages and recission on account of the failure to disclose the right to cancel and an inaccurate disclosure of appraisal fees in violation of TILA. BNY filed a third-party complaint against BNC, the original lender, who in turn filed a fourth-party action against USF, the Yamamotos' mortgage broker. The parties brought cross-motions for summary judgment. The district court determined that the damages claim was barred by TILA's one-year statute of limitations, 15 U.S.C. § 1640(e), but it found a triable issue of fact as to whether Yamamotos/Tampon received the proper disclosures. The court also held that the bankruptcy trustee was the proper plaintiff to pursue recission rather than the Yamamotos, and that the Yamamotos and Tampon, who had indicated that they were unable to tender the proceeds, could have sixty days to try to do so.[1] When the Yamamotos/Tampon failed to comply with either condition, the court dis-

[1]The court dismissed the state law claim brought under Hawaii's Unfair and Deceptive Trade Practices Act. The Yamamotos and Tampon do not challenge this ruling, nor do the Yamamotos appeal the decision to substitute the bankruptcy trustee in their stead. The Yamamotos' status makes no difference to resolution of the recission claim in any event, as Tampon may pursue this relief in her own right. While their brief mentions the issue of whether BNY was entitled to summary judgment on their claim for statutory damages, the issue is not argued and we deem it abandoned. *See Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001) ("Issues raised in a brief which are not supported by argument are deemed abandoned.").

missed the action and entered judgment for BNY. This appeal followed.[2]

II

Tampon argues that the district court could not deny her recission for failure to pay back loan proceeds without first determining whether TILA was violated, and without recognizing that TILA, and Federal Reserve Board Regulation Z implementing it, 12 C.F.R. § 226.23(d), automatically voided BNY's security interest in her property once she exercised her right to rescind.[3] She posits that language added in 1981 to Regulation Z indicates that a court has no discretion to change the substantive provisions of the Act, which is what she contends that the court did when it required tender prematurely. BNY counters that courts have long had equitable discretion to make repayment of loan proceeds a prerequisite to rescis-

[2]There is a question whether the district court entered a final decision that is appealable under 28 U.S.C. § 1291 because its order did not explicitly deal with the third- and fourth-party complaints which arguably could be read as seeking relief beyond contribution and indemnity. However, in response to our request for supplemental briefing, BNY and BNC represented that their complaints were reactive only and were therefore mooted by the court's ruling on summary judgment in favor of BNY. This, together with the fact that the court's order does dismiss the action, satisfies us that we may exercise appellate jurisdiction. *See Peura v. Mala*, 977 F.2d 484, 487 n.3 (9th Cir. 1992) (oversight in not disposing of third-party claims does not bar appellate jurisdiction); *see also Fed. Ins. Co. v. Scarsella Bros., Inc.*, 931 F.2d 599, 601 (9th Cir. 1991) (inferring rejection of claims where decision resolved all issues necessary to establish legal rights and duties of the parties).

[3]She also maintains that the sixty days allowed was inadequate and that no determination was ever made about the amount required to be tendered. However, no objection on either basis was made in the district court. Tampon never asked for more time, or indicated any ability to repay any amount. Nor did her counsel manifest any confusion about how the recission amount would be calculated. Therefore, we focus only on the legal question the appeal presents: whether the court had discretion to dismiss Tampon's recission claim for inability to tender proceeds without first determining if TILA were violated.

sion under TILA, and that discretion to alter the sequence of recission events is expressly preserved by Regulation Z.

[1] TILA was enacted in 1968 "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). If required disclosures are not made, the consumer may rescind. *See* 15 U.S.C. § 1635(a). Section 1635(b) governs the return of money or property when a borrower exercises the right to rescind.[4] It provides that the borrower is not liable for any finance or other charge, and that any security interest becomes void upon such a rescission. The statute adopts a sequence of rescission and tender that must be followed unless the court orders otherwise: within twenty days of receiving a notice of rescission, the creditor is to return any money or property and reflect termination of the security

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[4]Section 1635(b) states in full:

> When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

interest; when the creditor has met these obligations, the borrower is to tender the property.

[2] Section 226.23 of Regulation Z implements § 1635(b). It tracks the statute and states:

> (d) Effects of rescission.
>
> (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.
>
> (2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.
>
> (3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor . . . .
>
> (4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

12 C.F.R. § 226.23.

TILA's provision permitting a court to modify procedures was added in 1980 as part of the Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, tit. VI, § 612(a)(4), 94 Stat. 168, 175 (1980) (codified as amended at 15 U.S.C. § 1635(b) (1988)). *See Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1139-40 (11th Cir. 1992) (explaining background). In turn, subsection (d)(4) was added to Regulation Z

in 1981. These changes followed in the wake of decisions by this court and others which held that the statute need not be interpreted literally as always requiring the creditor to remove its security interest prior to the borrower's tender of proceeds. *See, e.g., Palmer v. Wilson*, 502 F.2d 860, 862-63 (9th Cir. 1974); *Ljepava v. M.L.S.C. Props., Inc.*, 511 F.2d 935, 944 (9th Cir. 1975); *LaGrone v. Johnson*, 534 F.2d 1360, 1361-62 (9th Cir. 1976); *Rudisell v. Fifth Third Bank*, 622 F.2d 243, 253-54 (6th Cir. 1980); *Powers v. Sims & Levin*, 542 F.2d 1216, 1220-22 (4th Cir. 1976); *but see Gerasta v. Hibernia Nat'l Bank*, 575 F.2d 580, 585 (5th Cir. 1978).

[3] Since *Palmer* we have recognized that in applying TILA, "a trial judge ha[s] the discretion to condition rescission on tender by the borrower of the property he had received from the lender." *Ljepava*, 511 F.2d at 944 (citing *Palmer*, 502 F.2d at 863-64)). As we explained, whether a decree of rescission should be conditional depends upon "the equities present in a particular case, as well as consideration of the legislative policy of full disclosure that underlies the Truth in Lending Act and the remedial-penal nature of the private enforcement provisions of the Act." *Palmer*, 502 F.2d at 862. Indeed, in *LaGrone* we held that rescission *should be* conditioned on repayment of the amounts advanced by the lender. *LaGrone*, 534 F.2d at 1362. We noted that the TILA violations there were not egregious (failure to disclose an acceleration clause and amount financed in the broker's statement, and to delineate additional data from mandatory data), and that the equities favored the creditor who would otherwise have been left in an unsecured position in the borrower's intervening bankruptcy. *Id.*

[4] Tampon correctly points out that we made it clear in *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 705-06 (9th Cir. 1986), that courts have no discretion to alter TILA's *substantive* provisions. However, *Semar* left intact the discretion to alter TILA's *procedural* provisions. In *Semar*, the district court had made the borrow-

ers responsible for interest and other charges listed on the closing statement contrary to § 1635(b), which states that the borrower "is not liable for any finance or other charge." We rejected the creditor's argument, based on *Palmer*, that the court had equitable discretion to alter the statute in this way. In so doing, we distinguished the *Palmer* line of authority on the footing that in those cases, the courts had simply altered TILA's procedures whereas the modification in *Semar* was substantive. *See Semar*, 791 F.2d at 706 n.15.

Trying to fit within *Semar*, Tampon argues that subsection (d)(4) of Regulation Z is a substantive provision that does not allow for modification of (d)(1) — the subsection that provides for automatic voiding of BNY's security interest upon recission — because (d)(4) only permits a court to order modification of the procedures set out in subsections (d)(2) and (d)(3). While it is true that (d)(4) confers discretion to modify (d)(2) and (d)(3), not (d)(1), the argument only goes so far as it begs the question of when a transaction is "rescinded." For Tampon to prevail, rescission must be accomplished automatically upon her decision to rescind, communicated by a notice of rescission, without regard to whether the law permits her to rescind on the grounds asserted. We believe this makes no sense when, as here, the lender contests the ground upon which the borrower rescinds.

[5] If BNY had acquiesced in Tampon's notice of rescission, then the transaction would have been rescinded automatically, thereby causing the security interest to become void and triggering the sequence of events laid out in subsections (d)(2) and (d)(3). But here, BNY contested the notice and produced evidence sufficient to create a triable issue of fact about compliance with TILA's disclosure requirements. In these circumstances, it cannot be that the security interest vanishes immediately upon the giving of notice. Otherwise, a borrower could get out from under a secured loan simply by *claiming* TILA violations, whether or not the lender had actually committed any. Rather, under the statute and the regulation, the

security interest "becomes void" only when the consumer "rescinds" the transaction. In a contested case, this happens when the right to rescind is determined in the borrower's favor.

The First Circuit held as much in *Large v. Conseco Finance Servicing Corporation*, 292 F.3d 49, 54-55 (1st Cir. 2002). The Larges made an argument similar to Tampon's, that their letter of rescission had the automatic and immediate effect of voiding a loan transaction. *Id.* at 54. The court observed that "[n]either the statute nor the regulation establishes that a borrower's mere assertion of the right of rescission has the automatic effect of voiding the contract." *Id.* Instead, the "natural reading" of the language of § 1635(b) "is that the security interest becomes void when the obligor exercises a right to rescind that is available in the particular case, either because the creditor acknowledges that the right of rescission is available, or because the appropriate decision maker has so determined . . . . Until such decision is made, the [borrowers] have only advanced a claim seeking rescission." *Id.* at 54-55. *Cf. Williams*, 968 F.2d at 1141-42 (noting that recission is automatic but rejecting the argument that § 226.23(d)(4)'s lack of reference to subsection (d)(1) restricts a court's ability to impose conditions that run with the voiding of a creditor's security interest upon terms that are equitable); *see also Quenzer v. Advanta Mortgage Corp. USA*, 288 B.R. 884, 888 (D. Kan. 2003) ("within the meaning of [TILA], 'rescission' does not mean an annulment that is definitively accomplished by unilateral pronouncement, but rather a remedy that restores the *status quo ante*.") (citing *Ray v. Citifinancial, Inc.*, 228 F. Supp. 2d 664 (D. Md. 2002)).[5] We are persuaded by this reasoning.

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[5]Other courts have also held that rescission may be conditioned on the borrower's repayment of loan proceeds. *See, e.g., FDIC v. Hughes Dev. Co.*, 938 F.2d 889, 890 (8th Cir. 1991) (district court did not err in conditioning rescission on tender of $100,000 principal within one year); *Williams*, 968 F.2d at 1141-42 (voiding of creditor's security interest in home may be conditioned on consumer's tender of amount owed to creditor after

[6] Thus, a court may impose conditions on rescission that assure that the borrower meets her obligations once the creditor has performed its obligations. Our precedent is consistent with the statutory and regulatory regime of leaving courts free to exercise equitable discretion to modify rescission procedures. This also comports with congressional intent that "the courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required by the act." S.Rep. No. 368, 96th Cong., 2d Sess. 29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 265.

[7] As rescission under § 1635(b) is an on-going process consisting of a number of steps, there is no reason why a court that may alter the sequence of procedures *after* deciding that rescission is warranted, may not do so *before* deciding that rescission is warranted when it finds that, assuming grounds for rescission exist, rescission still could not be enforced because the borrower cannot comply with the borrower's rescission obligations no matter what. Such a decision lies within the court's equitable discretion, taking into consideration all the circumstances including the nature of the violations and the borrower's ability to repay the proceeds. If, as was the case here, it is clear from the evidence that the borrower lacks capacity to pay back what she has received (less interest, finance charges, etc.), the court does not lack discretion to do before trial what it could do after.

[8] Whether the call is correct must be determined on a case-by-case basis, in light of the record adduced. Here, for example, at oral argument Tampon pressed upon us the possi-

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subtracting all finance charges and penalties); *Bustamante v. First Fed. Sav. & Loan Ass'n*, 619 F.2d 360, 365 (5th Cir. 1980) (creditor's TILA obligations were not automatically triggered until obligor tendered repayment); *In re Wepsic*, 231 B.R. 768, 776 (Bankr. S.D. Cal. 1998) (conditioning "the benefits of rescission" on the borrower's tender of "her duty of repayment under the statute").

bility that borrowers could refinance or sell the property between the time a court grants rescission and when pay back is required, yet to do so they must have an order in hand. We express no opinion on this, for there is nothing at all to this effect in the record. We simply decide that in the circumstances of this case, the court did not lack discretion to modify the sequence of rescission events to assure that Tampon could repay the loan proceeds before going through the empty (and expensive) exercise of a trial on the merits.

AFFIRMED.

Order,
Case No. 01-16427,
U.S. Court Of Appeals
For The Ninth Circuit,
Filed July 29, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN T. YAMAMOTO, ET AL.,	)	Case No. 01-16427
	)	
	)	ORDER
Plaintiffs-Appellants,	)	
	)	
vs.	)	
	)	
BANK OF NEW YORK, ET AL.,	)	
	)	
	)	
Defendants-Appellees.	)	
	)	

Before: GOODWIN, RYMER, and T.G. NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Rymer and T. G. Nelson voted to deny the petition for rehearing en banc and Judge Goodwin so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

(2)

No. 03-659

December 17, 2003

In The

Supreme Court of the United States

MELVIN T. YAMAMOTO, ELAINE S. YAMAMOTO, and MAXINE H. TAMPON,

Petitioners,

vs.

BANK OF NEW YORK, BNC MORTGAGE, INC., and U.S. FINANCIAL MORTGAGE CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Even assuming that grounds for TILA rescission otherwise existed, whether it was proper for the district court to dismiss the TILA complaint in light of: (1) debtors' admitted inability to tender the proceeds, and (2) debtors' subsequent failure to make any effort to tender the proceeds or to seek additional time to tender the proceeds after being given sixty (60) days to do so by the court.

CORPORATE DISCLOSURE STATEMENT

Respondent The Bank of New York is a non-governmental corporate party, incorporated in the State of New York. No individual or public company owns ten percent or more of stock of the company.

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REASONS FOR DENYING THE PETITION

I. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

The premise of the pending Petition for Writ of Certiorari (the "Petition") is that debtors should be able to avoid summary dismissal of their Truth-in-Lending Act ("TILA", 15 U.S.C. §1601, et seq.) lawsuit, even having admitted their inability to tender the amount of proceeds estimated to be necessary to effect rescission under the TILA, on the basis that the court did not make a definitive ruling that rescission would otherwise be warranted under their factual allegations. The premise is not supported by the law and the Petition should be denied.

The facts of this case show that: (1) on cross motions for summary judgment, hearing a potential justification for rescission, but also the admissions of the debtors' inability to tender the estimated funds, the court denied both cross motions as to the rescission claim, and provided debtors a designated period of time in which to make the tender – warning that failure to do so would result in dismissal, (2) the court's ruling denying the summary judgment was based on an "assumption that the disclosure . . . entitle[d] debtors to rescission," and (3) having been instructed by the court to tender the funds within that certain period of time, the debtors failed either to ask for additional time to make the tender or to make any showing of any effort to attempt to make the tender; the court then entered the dismissal.

The Petition, however, misconstrues the rulings below, ignoring and omitting from the Petition any of the language from the opinions (both district and Ninth Circuit),

which demonstrate that at each juncture, the court took into account the presumption that there had been TILA violations which would have justified rescission. In addition, the Petition relies on an erroneous inference that the debtor(s) had no knowledge of the amount necessary for the tender. Further, the Ninth Circuit ruling does not demonstrate any split among the circuits. Those misrepresentations of the record and the law should preclude granting of the instant Petition.

TILA provides that when a consumer borrows funds secured by their principal dwelling (except for the acquisition or construction thereof), they automatically have a period of three business days in which to rescind the transaction. 15 U.S.C. §1635(a). The concept at that juncture is simple, as the lender does not finance the transaction until those three days have lapsed (Reg. Z, 12 C.F.R. §226.23(c)), so the common law concept of rescission – to unmake the contract and return the contracting parties to their status quo – is relatively easily attained.

In further protecting the consumer and punishing the lender, TILA includes a provision that if the notice of the right to rescind, or the material disclosures, are not properly provided to the consumer, then the three day period for rescinding the transaction may extend to three years. Reg. Z, 12 C.F.R. §226.23(a)(3). At that point, in a valid case upon proper notice and demand from the debtor, the lender's security interest is to be voided, but the consumer must tender the principal sum then due, less interest payments and finance charges. 15 U.S.C. §1635(b), 15 U.S.C. §1605(a); see *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 705 (9th Cir. 1986). Thus, a consumer who successfully brings

a TILA lawsuit well into the third year of a qualified transaction may find a windfall.

In the instant case, about 18 months into the loan obligation, the debtors[1] demanded rescission on the sole basis that they had not received the requisite completed Notice of Right to Cancel forms. The creditor, in writing, disputed the allegation and denied the rescission demand; the debtors, represented by counsel, then filed the TILA action below.

As a result of discovery, debtors alleged they had an additional basis on which to seek rescission. However, also in the discovery phase of the litigation, during the course of the debtors' depositions they admitted their inability to tender the estimated principal sum due, even after subtracting finance charges and interest paid.

At the district court hearing on cross-motions for summary judgment, Petitioner argued that she had a right to rescind the subject loan on the basis that an appraisal fee was erroneously overcharged. Rather than forcing the lender to immediately cancel its security interest in the subject property, the court listened to testimony concerning the consumer's obligation and ability – or inability – to tender sums due to the creditor under the relevant rescission formula. The testimony included a discussion of the amount required for rescission, which was estimated to be about $150,000.00. The court, even "assuming that debtors were entitled to rescission," denied the cross-motions for

[1] The underlying lawsuit was brought by three persons – two of which were dismissed on separate grounds not relevant to the instant petition. There is, therefore, only one petitioner.

summary disposition of the rescission claim, and instead ordered the petitioner to tender the loan proceeds within 60 days, warning that failure to comply would result in the dismissal of the rescission claim. When the petitioner failed to either demonstrate any effort to tender, or request any additional time in which to tender, and indeed, simply failed to tender, the district court dismissed the case.

The Ninth Circuit Court of Appeals affirmed, stating:

> As rescission under §1635(b) is an on-going process consisting of a number of steps, there is no reason why a court that may alter the sequence of procedures *after* deciding that rescission is warranted, may not do so *before* deciding that rescission is warranted when it finds that, assuming grounds for rescission exist, rescission still could not be enforced because the borrower cannot comply with the borrower's rescission obligations no matter what.

Yamamoto v. Bank of New York, 329 F.3d 1167, 1173 (9th Cir. 2003) (emphasis in original). This language was preceded in the Ninth Circuit opinion by citation to the congressional intent as to the TILA regulations, which is likewise quoted, as follows:

> [T]he courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required by the act.

Id., quoting S.Rep. No. 368, 96th Cong., 2d Sess. 29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 265.

The Petition avoids or misrepresents those facts as to the courts' positions as to any right to rescission, or the debtors' knowledge of the estimated tender amount.

The Petition construes its argument largely on a partial quotation of the above-quoted language from the Ninth Circuit – specifically, the petition deletes the language which makes the assumption that grounds for rescission exist. After deleting the language which makes the assumption that grounds for rescission exists, the Petition then construes the above-quoted language from the Ninth Circuit to be a premature denial of a substantive right to rescission.

The petition then relies on an inference that debtor had no knowledge of the amount necessary for tender. The inference is not accurate, as although there was no actual calculation made during the course of the proceedings, the district court did receive uncontested testimony that the rescission calculation would be in the range of approximately $150,000.00, less reasonable attorneys' fees, and that the debtors had admitted an inability to be able to raise even $20,000.00. The Ninth Circuit correctly stated the record, that no objection "was ever made about the amount required to be tendered." 329 F.3d at 1170-1171, n.3.

This is not a case where the lack of a specific amount due precluded the debtor(s) from seeking financing for their TILA rescission demand. Rather, they provided no evidence of any effort or ability to obtain any financing or funding in any way. On those facts, the record does not support the question presented in the Petition.

II. THE PROCEEDINGS IN THIS CASE ARE NOT REPRESENTATIVE OF ANY INCONSISTENCY IN THE NINTH CIRCUIT, NOR DOES IT REPRESENT A SPLIT IN THE CIRCUITS CONCERNING CONDITIONING OF THE TILA PROCESS

The Petition seeks the time and attention of this Court to address a purported split between the Ninth Circuit and all other Circuits, as well as Petitioner's perception of an inconsistency within the Ninth Circuit's precedence. Petitioner contends that "no federal court in any other circuit has required borrowers to tender first before adjudicating the validity of rescission claims." (Petition at 7.) The underlying contention of the Petition, as shown above, misrepresents the position of either the District or the Ninth Circuit Courts in their rulings. In both instances, the courts presumed that rescission would have been warranted. The next step taken by the District Court, and affirmed by the Ninth Circuit, was to condition any order of rescission on the debtor's tender of the remaining principal due under the TILA formula.

What Petitioner seeks is her purported "self-enforcing mechanism" – which, were the court to enter an order adjudicating the rescission claim to be valid, would presumably result in automatically voiding the security interest, without any payment to the creditor. That result, as recently noted by a bankruptcy judge in the Eastern District of Pennsylvania, is contrary to the rulings in the circuit courts. In a substantial opinion which included analysis of the issue of whether rescission should be conditioned upon tender by the debtor, along with a survey of the current position of the federal bench on the issue, the court stated that:

> [The] argument [that rescission should be conditioned upon Debtor's tender] is supported by the clear majority of circuit courts that have addressed the issue. See *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1140-42 (11th Cir. 1992); *Federal Deposit Insurance Corporation v. Hughes Development Company*, 938 F.2d 889, 890 (8th Cir. 1991); *Brown v. National Permanent Savings and Loan Association*, 683 F.2d 444 (D.C. Cir. 1982); *Rudisell v. Fifth Third Bank*, 622 F.2d 243, 254 (6th Cir. 1980); *Powers v. Sims and Levin (In re Powers)*, 542 F.2d 1216, 1221-22 (4th Cir. 1976); *LaGrone v. Johnson*, 534 F.2d 1360, 1362 (9th Cir. 1976).

In re Williams, 291 B.R. 636, 655-656 (E.D. Pa 2003).[2] The opinion cites the Fifth Circuit as holding otherwise, citing both *Gerasta v. Hibernia National Bank*, 575 F.2d 580, 584-85 (5th Cir. 1978), and *Harris v. Tower of Loan of Mississippi, Inc.*, 609 F.2d 120, 123 (5th Cir. 1980). *Williams*, 291 B.R. at 656. However, as explained by the Eleventh Circuit, both of these Fifth Circuit cases preceded the enactment of the Simplification and Reform Act, Pub.L.No. 96-221, tit. VI, §612(a)(4), 94 Stat. 168, 175 (1980) (codified as amended at 15 U.S.C. §1635(b)). *Homestake*, 968 F.2d at 1140. The last sentence of that codification states:

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[2] Interestingly, regardless of the weight of all of the circuit courts otherwise, the bankruptcy judge in the *Williams* case ultimately relied on the difference between non-bankruptcy settings as opposed to the bankruptcy context with "altered rights and remedies," and decided to void the mortgage without conditioning rescission on the tender. 291 B.R. at 661. Notably, however, the total amount financed was less than $20,000.00. 291 B.R. at 641.

> The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

15 U.S.C. §1635(b). Thus, as the *Homestake* court correctly points out, any perceived disagreement in the Fifth Circuit is not supported, as the federal statute essentially superceded the *Gerasta* and *Harris* holdings.

The *Williams* survey of the federal courts states that although the Third Circuit has not spoken on the issue, a bankruptcy court sitting in that circuit has conditioned rescission on the tender, in *Apaydin v. Citibank Federal Savings Bank (In re Apaydin)*, 201 B.R. 716, 723-24 (Bankr. E.D. Pa. 1996). As to the Tenth Circuit, the *Williams* opinion notes only that a bankruptcy court within the Tenth Circuit which had refused to condition rescission was reversed by the district court in *Quenzer v. Advanta Mortgage Corporation, USA*, 288 B.R. 884, 886-89 (D.Kan. 2003). Interestingly, the *Quenzer* court relied on *Rachbach v. Cogswell*, 547 F.2d 502 (10th Cir. 1976), as significant authority for altering the statutory scheme of TILA because rescission is an equitable remedy. *Rachbach*, of course, predated the Simplification and Reform Act, but nonetheless supported altering the TILA statutory scheme.

Finally, in its preamble to distinguishing bankruptcy proceedings from the mainstream circuit court cases on TILA rescission, the opinion in *Williams* cites *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 706 n.15 (9th Cir. 1986), as demonstration that the Ninth Circuit supports the authority of the district courts to alter the procedures in applying the TILA provisions of 15 U.S.C. §1635(b). 291 B.R. at 656 n.24. This perception squares directly with the Ninth Circuit holding which

Petitioner seeks to overturn.[3] More specifically, rather than being an automatic, self-enforcing mechanism, the federal courts, including the Ninth Circuit, have held that the mechanics of rescission call for the court to use its discretion in effecting the rights of the parties – including "conditioning the granting of rescission on the debtor's compliance with the court's order to tender to the creditor the principal of the loan that the debtor has received." *Palmer v. Wilson*, 502 F.2d 860, 862 (9th Cir. 1974).

Since the *Williams* analysis, dated in April 2003, listing the position of the circuits which have spoken on the issue, an additional bankruptcy case within the Tenth Circuit also supports the conditional rescission, *In re Webster*, 300 B.R. 787 (2003), and a district court in the Seventh Circuit has spoken on the issue, indicating its willingness to enter a court order modifying the provisions as to the order of performance in a TILA rescission. *Velazquez v. Homeamerican Credit, Inc.*, 254 F.Supp.2d 1043, 1047 (N.D. Ill. 2003) (interestingly noting concern for the potential situation where the consumer might give the creditor an indication that she could not tender the money after the creditor performed).

Thus, with the exception of some aberration of cases within the bankruptcy context, which does not include the instant matter, there is no split in the circuits for this court to address, and the Ninth Circuit has retained its

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[3] Petitioner's citation to *Dinsmore-Thomas v. FDIC*, 1998 U.S. App. LEXIS 12777 (9th Cir. Feb. 19, 1998), is a blatant violation of Ninth Circuit Rule 36-3, as it is an unpublished opinion, which may be cited only in specific circumstances, none of which apply herein.

consistency. On that basis, the dismissal, affirmed by the Ninth Circuit Court of Appeals, was correct.

CONCLUSION

For the foregoing reasons, Respondent Bank of New York respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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